SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938

No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, AND U. S. WEBB, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

ALFRED SUTRO,
FRANCIS N. MARSHALL,
Counsel for Appellant.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

This is an appeal from a final decree of a district court of the United States specially constituted pursuant to Section 266 of the Judicial Code, denying a permanent injunction and dismissing the bill of complaint.

The suit was brought by the appellant in the United States District Court for the Northern District of California, Southern Division, to enjoin State officers—the State Board of Equalization of the State of California and its individual members, and the Attorney General of the State—from enforcing the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297, ch. 361) with respect to property purchased by appellant outside the State and used by it in the State in the operation of its inextricably intermingled interstate and intrastate telephone and telegraph business. The injunction is prayed upon the ground that the statute, as sought to be applied by the appellees with respect to the property in question, is repugnant to the commerce clause of the Federal Constitution.

The appellant pressed its application for an interlocutory injunction, and the court, specially constituted of three judges, denied appellees' motion to dismiss the bill of complaint and granted the application for interlocutory injunction. The application was heard with a like application in a similar case, *Southern Pacific Company* v. *Corbett*, hereinafter referred to as the *Southern Pacific* case. The opinion on the motion to dismiss and the application for interlocutory injunction is not reported; a copy is appended hereto as Appendix A. At the same time the court rendered an opinion in the *Southern Pacific* case, which is reported at 20 F. Supp. 940.[1]

Appellees answered and the facts were stipulated. Upon final hearing, the court made findings of fact and conclusions of law, denied a permanent injunction and dismissed the

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[1] The opinions of the District Court of the United States for the Northern District of California on the motion to dismiss and on the final hearing in the case of *Southern Pacific Company* v. *Corbett* will be found printed as appendices to the Statement as to Jurisdiction in the case of *Southern Pacific Company* v. *Corbett*, No. 212, October Term, 1938.

bill. The court's opinion is not reported.[2] At the same time the court took similar action in the *Southern Pacific* case and its opinion in that case is not yet reported.[3]

Jurisdiction of the District Court.

This is a suit of a civil nature in equity, in which the amount of the taxes the collection of which is sought to be enjoined exceeds $3,000,[4] and the suit arises under the Constitution of the United States.

The bill of complaint alleged facts showing that appellant would be irreparably injured if the injunction should not be granted, and showing that appellant was without a plain, speedy or adequate remedy at law or in equity in the State courts, and particularly that the appellant was without any remedy at law in the Federal courts.[5] The District Court sustained its equity jurisdiction on the ground last mentioned, the only ground which it found it necessary to consider (see opinion in the *Southern Pacific* case).

It is well settled that in suits not controlled by the 1937 amendment to Section 24 of the Judicial Code, the want of

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[2] Since the presentation and filing of the jurisdictional statement, this opinion has been reported at 23 F. Supp. 197.

[3] Since the presentation and filing of the jurisdictional statement, this opinion has been reported at 23 F. Supp. 193.

[4] The amount of the taxes claimed to be due at the time the suit was commenced was $16,544.07. The complaint asks an injunction against the collection of these taxes and of the taxes for each subsequent quarterly period for which appellees claim that a tax is due under the provisions of the California Use Tax Act.

[5] The bill of complaint in this case was filed August 11, 1936. The Act of Congress of August 21, 1937 (c. 726, 50 Stat. 738), amending section 24 of the Judicial Code, which now provides that no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state, expressly provided that its provisions should not apply to suits commenced prior to its passage.

a remedy in the Federal courts is a ground of Federal equity jurisdiction.

City Bank Co. v. *Schnader* (1934), 291 U. S. 24, 29;
Risty v. *Chicago, R. I. & Pac. Ry. Co.* (1926), 270 U. S. 378, 388;
Chicago, B. & Q. R. R. v. *Osborne* (1924), 265 U. S. 14, 16;
Smyth v. *Ames* (1898), 169 U. S. 466, 515-517.

Jurisdiction of the Supreme Court of the United States.

As above stated, this is a direct appeal from the final decree of a specially constituted court of three judges, denying a permanent injunction in a suit brought to restrain State officers from enforcing a State statute. This Court has jurisdiction under Sections 238(3) and 266 of the Judicial Code (United States Code, Title 28, Secs. 345 and 380).

The following cases sustain the jurisdiction of this Court:
Stratton v. *St. Louis S. W. Ry.* (1930), 282 U. S. 10, 14, 16;
Sterling v. *Constantin* (1932), 287 U. S. 378, 393-394;
Coverdale v. *Arkansas-Louisiana Pipe Line Co.* (1938), — U. S. —, 58 S. Ct. 736, 738.

The State Statute the Validity of Which is Involved.

The California statute the enforcement of which is sought to be enjoined in this suit is the California Use Tax Act of 1935, Cal. Stats. 1935, p. 1297, ch. 361. Since this suit was commenced, the statute was amended, in particulars not pertinent to this suit except as hereinafter specified, by Cal. Stats. 1937, pp. 1327, 1874 and 1935, chs. 401, 671 and 683. Section 3 of the act, so far as material, provides:

> "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal

property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State, at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *."

Section 2(a) defines "Storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer." Section 2(b) defines "Use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business." Section 2(j) defines "In this State" as "within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America."

Section 4 contains a number of exemptions, among which are (a) property, the gross receipts from the sale of which are taxed by the California Retail Sales Tax Act (Cal. Stats. 1933, ch. 1020) and (b) property, the storage, use or other consumption of which the State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of California. The effect of the first exemption in Section 4 is to make the use tax applicable only to tangible personal property purchased outside the State or in interstate commerce.

Section 6 requires every retailer maintaining a place of business in the State and making sales of tangible personal property for storage, use or other consumption in the State, to collect the tax from the purchaser at the time of making the sales. Section 7 makes the tax due and payable quarterly to the State Board of Equalization on or before the

15th day of the month next succeeding each quarterly period, the first quarterly period being that which commenced July 1, 1935. It also requires every retailer maintaining a place of business in the State to file with the Board, on or before the 15th day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by the act; and to accompany the return by a remittance of the amount of the tax required to be collected by the retailer during that period. If the property is purchased from a retailer not maintaining a place of business in the State, the purchaser is required to file the return and remittance.

Section 8 imposes a penalty of ten per cent, plus interest of one half of one per cent per month, or fraction thereof, for failure to pay the tax or make the return.

Section 20 provides for a summary judgment for the amount of unpaid taxes in favor of the State and against the retailer or other person required to pay the tax, and permits the Board to seize the property of delinquents and sell it at public auction for the amount of the tax, interest, penalties and costs. Section 28 (Section 24 since the 1937 amendment) permits the Board to bring suit at any time within three years after any amount has become due and payable and has become delinquent, and a certificate of the Board showing the delinquency is made *prima facie* evidence of the determination of the amount due, of the delinquency, and of the compliance by the Board with all the provisions of the act in relation to the computation and determination of the amount.

Section 30 (Section 26 since the 1937 amendment) makes any retailer or other person failing or refusing to furnish

a return, or supplemental return or other data required by the Board, guilty of a misdemeanor and subject to a fine of not exceeding $500 for each offense. Section 31 (Section 27 since the 1937 amendment) makes any violation of the act, except as otherwise therein provided, a misdemeanor and punishable as such.

Section 29 (Section 25 since the 1937 amendment) forbids the issuance of any injunction or writ of mandate or other legal or equitable process in any suit, action or proceeding in any court against the State or any officer thereof to prevent or enjoin the collection of the tax or any amount of tax imposed by the act. The only remedy afforded to the taxpayer is to pay the tax under verified protest, setting forth the grounds of objection to the legality thereof, and thereafter to bring a suit against the State Treasurer in the State Superior Court in Sacramento County to recover the amount of the tax so paid. The period of limitation for such suits is sixty days (since the 1937 amendment—one year). The Superior Court is forbidden to consider any grounds of illegality other than those set forth in the protest filed at the time of the payment of the tax. If judgment in such action is rendered for the plaintiff, the amount of the judgment is first to be credited on any taxes or amounts due from the plaintiff under the act, and the balance of the judgment is to be refunded to the plaintiff with interest allowed at the rate of six per cent per annum upon the amount found to have been illegally collected, from the date of payment to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller (since the 1937 amendment, by the Board). The act prohibits any judgment in any such action when it is brought by or in the name of an assignee of the retailer or other person paying the tax, or by any person other than the person paying the tax.

The Questions Involved are Substantial.

The appellant is engaged exclusively in inextricably intermingled interstate and intrastate telephone and telegraph business. The property in question is specially manufactured telephone equipment, purchased by the appellant with operating capital for the sole purpose of using it in that business. A part of the equipment, referred to throughout the record as "specific order equipment," consists of special equipment specially designed for a particular purpose, which, upon its arrival in California, is installed and used in appellant's operating telephone plant without delay. Another part of the equipment, referred to as "stand-by facilities," consists of equipment which for efficient public service is required to be kept at various strategic points in appellant's telephone system, ready to be installed to make repairs and to meet emergency demands.

The tax is a flat-rate tax upon the use, storage or other consumption of this property, measured by three per cent of the purchase price, without apportionment to take into account the division of use between intrastate and interstate commerce.

Under the doctrine of *Helson and Randolph* v. *Kentucky* (1929), 279 U. S. 245, which was reaffirmed in *Bingaman* v. *Golden Eagle Lines* (1936), 297 U. S. 626, and was recognized in *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (1938), — U. S. —, 58 S. Ct. 736, State statutes taxing the use of property in interstate commerce for the operation of instrumentalities of interstate commerce are unconstitutional as in violation of the commerce clause.

Under *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384, a State excise tax cannot validly be applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce.

The appellant contends that the use of the property in question, being indiscriminately in interstate and intrastate commerce, cannot constitutionally be subjected to the flat-rate, unapportioned tax in question; that the holding of stand-by facilities is a part of the conduct of its inextricably intermingled interstate and intrastate commerce and business; and that no use, storage or other consumption of the property occurs in California which is not a part of that commerce.

The District Court, upon the appellees' motion to dismiss the bill of complaint and the appellant's application for an interlocutory injunction, held that the use, keeping, retention or storage of the property which occurred in the State of California was a use in interstate commerce and was not taxable by the state, and that the case was not controlled by the decisions in *Nashville, C. & St. L. Ry.* v. *Wallace* (1933), 288 U. S. 249, and *Edelman* v. *Boeing Air Transp.* (1933), 289 U. S. 249 (see Appendices A and B). On final hearing the District Court reversed its conclusion, holding that, although the stipulated facts sustained the pertinent allegations of the bill of complaint discussed in its former opinion, and although the use of the property was a use in interstate commerce, the threatened enforcement of the taxing statute would not impose a direct or undue burden on the appellant's interstate commerce business (see Appendices C and D).

This Court has never specifically decided (although appellant contends that the *Helson, Bingaman* and *Cooney* cases, *supra*, are decisive of the case) whether a use tax, measured by a fixed percentage of the purchase price of property without apportionment according to the division of use in intrastate and interstate commerce, and imposed directly upon (a) the use in inextricably intermingled interstate and intrastate commerce or (b) the installation or (c) the retention for stand-by purposes, of special telephone

equipment which is purchased by a telephone company engaged exclusively in inextricably intermingled interstate and intrastate commerce for use exclusively in that business, and which is manufactured specially for and dedicated exclusively to and is not divertible from that business, and which is used exclusively in and is necessary to the conduct of that commerce, contravenes the commerce clause of the Federal Constitution.

The questions presented, we submit, are substantial.

The Date of the Decree Sought to be Reviewed and the Date on Which the Application for Appeal was Presented.

The final decree of the District Court which is herein appealed from was signed and filed June 14, 1938. The application for appeal was presented June 20, 1938.

Dated June 20, 1938.

Respectfully submitted,

ALFRED SUTRO,
FRANCIS N. MARSHALL,
Counsel for Appellant.

APPENDIX "A".

Opinion of the District Court on the Motion to Dismiss and Application for Interlocutory Injunction.

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

IN EQUITY.

No. 4067-R.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Plaintiff*,

v.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS RAY L. EDGAR and RAY L. RILEY, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California, *Defendants*.

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges.

DENMAN, *Circuit Judge*.

Plaintiff, Pacific Telephone and Telegraph Company, brings a bill for injunction against the defendants, state officers, to restrain the latters' threatened enforcement of the California Use Tax (Cal. Stats., 1935, ch. 361) upon property purchased by plaintiff outside the state and shipped within for use in its communication system which system performs inextricably intermingled interstate and intrastate commerce functions.

The case was heard together with that of Southern Pacific Company v. Corbett, Equity No. 4055-S, and the material issues are identical with those presented and decided in that case. Very little separate statement is required.

The property purchased outside the state by the plaintiff is acquired from Western Electric Company, plaintiff in case 4066-L (Equity), which is a retailer maintaining a place of business in California. The bill of complaint recites allegations substantially identical with those in the Southern Pacific case as to the allocation and dedication of the property upon its purchase to interstate commerce uses, as to the purchasing, financing and accounting being carried on under rules of the Interstate Commerce Commission, and as to any "keeping or retention" of the property within the state being in itself a use in interstate commerce.

The complaint thus describes the property:

> "A part of said property was purchased by plaintiff and shipped to it to various points in the State of California as standby telephone and telegraph facilities of plaintiff for its said interstate and intrastate telephone and telegraph business; and said part of said property was held and used by plaintiff as a part of its said interstate and intrastate telephone and telegraph system as such standby facilities as required in the performance of its obligations to the public as a public service company, and in the conduct of its said interstate and intrastate telephone and telegraph business * * *.
>
> "The remaining part of said property consisted of central office switchboards, large private branch exchange switchboards, telephone cables and components of telephone and telegraph lines purchased by plaintiff and shipped to it from time to time, under respective specific orders of plaintiff, to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its shipment as part of the said interstate and intrastate telephone and telegraph system of plaintiff and for use exclusively by plaintiff for its said interstate and intrastate telephone and telegraph business * * *.
>
> "Because of the large extent of plaintiff's telephone and telegraph system so operated, it is necessary in

the interest of business economy and efficient public service for plaintiff to purchase much of its supplies in large quantities in anticipation of current and recurring needs and to effect deliveries thereof to the extent reasonably possible in carload lots to the points of distribution and use, and it is necessary to have supplies to meet current requirements distributed over the entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements as well as the regular emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time unavoidably arise from the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting such telephone and telegraph commerce and business * * *.

"All of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, are peculiarly adapted to telephone and telegraph uses as aforesaid and are not suitable for any other use."

It is plain from the allegations of the complaint, admitted by the motion to dismiss, that the property in question here was partly "standby" or reserve material and partly material purchased for existing maintenance needs, precisely as was the situation in the *Southern Pacific* case. Here, as in that case, the "keeping", "retention", or "storage" of the material was a use in interstate commerce preparatory to a subsequent use after physical integration in the plant.

For the reasons set out in the *Southern Pacific* case, the motion to dismiss herein is denied, and an interlocutory

injunction granted. Findings of fact, conclusions of law and decree to be submitted by plaintiff.

WILLIAM DENMAN,
U. S. Circuit Judge.
MICHAEL J. ROCHE,
U. S. District Judge.
A. F. ST. SURE,
U. S. District Judge.

(Endorsed:) Filed Sep. 10, 1937.

APPENDIX "B".

Opinion of the District Court on Final Hearing.

Alfred Sutro, Francis N. Marshall, Standard Oil Building, San Francisco, Attorneys for Plaintiff.

Pillsbury, Madison & Sutro, Standard Oil Building, San Francisco, of Counsel.

U. S. Webb, Attorney General, State of California; H. H. Linney, Deputy Attorney General; James J. Arditto, 640 State Building, San Francisco, Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Equity No. 4067-R,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a Corporation), *Plaintiff,*

v.

JOHN C. CORBETT *et al., Defendants.*

OPINION.

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

DENMAN, *Circuit Judge:*

The stipulation of facts filed herein supports the essential allegations of the bill of complaint.

The material, the storage use of which defendants seek to tax, consists (1) of specific order equipment including central office switchboards, frames, switches, cables, wires and other essential components of telephone and telegraph transmission; and (2) reserve or "stand-by" facilities of the sort just described which must be kept on hand in sufficient quantities to meet emergencies and new demands.

The principles governing the taxation of the use of this material are identical with those applicable in Southern Pacific Co. v. Corbett, No. 4055-R (Filed May 3, 1938). For the reasons stated in our opinion in that case, we conclude that the bill herein must be dismissed.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

WILLIAM DENMAN,
United States Circuit Judge.
MICHAEL J. ROCHE,
United States District Judge.
A. F. ST. SURE,
United States District Judge.

May 4, 1938.

(Endorsed:) Filed May 4, 1938.